MOTION FILED

APR 12 2006

No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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MOTION OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to this Court's Rule 37.2(b), the National Association of Securities Dealers, Inc., respectfully moves for leave to file the attached *amicus curiae* brief supporting petitioners. A letter signed by petitioners' counsel consenting to the filing of this brief has been lodged with the Court. Counsel for respondents has withheld consent to the filing of this brief.

The question presented in this case is whether a cause of action is available under the federal antitrust laws to challenge alleged collusive conduct and market manipulation in initial public offerings by underwriters and institutional investors. The National Association of Securities Dealers, Inc. ("NASD"), has a substantial interest in the resolution of this question because, pursuant to federal law, the NASD has

regulatory responsibilities that fall within the subject matter of this antitrust suit. The availability of an antitrust cause of action based on alleged collusion and market manipulation by broker-dealers would disrupt the NASD's carefully calibrated regulatory regime.

The NASD is a private Delaware corporation, functioning as a self-regulatory organization ("SRO") and registered with the Securities and Exchange Commission ("SEC") as a national securities association. 15 U.S.C. § 78o-3. The NASD and other SROs exercise regulatory authority over the securities industry, subject to the stringent oversight of the SEC. For more than half a century, the NASD has been the primary regulatory body for the broker-dealer industry, and it closely regulates the market activities of the underwriters and institutional investors named as defendants in this antitrust suit. Significantly, the NASD has initiated disciplinary proceedings in response to the incidents of alleged price manipulation challenged in this case, including against several of the petitioners.

The NASD's regulatory responsibilities provide it with a unique perspective into the issues raised by this case and a profound awareness of the far-reaching consequences that would result from superimposing the antitrust laws on the securities regulatory framework. The Second Circuit's holding that investors may bring antitrust suits challenging alleged collusion and market manipulation by broker-dealers will create conflicting systems of securities regulation and significantly disrupt the uniform national securities market that Congress intended to establish. The pervasive litigation and crippling regulatory confusion that will inevitably result from the Second Circuit's decision will impede the NASD's efforts to regulate the broker-dealer industry in a manner that promotes market stability and capital formation.

For the foregoing reasons, the NASD respectfully requests that this Court grant its motion for leave to file the attached *amicus curiae* brief.

Respectfully submitted.

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April 12, 2006

QUESTION PRESENTED

Whether a cause of action is available under the federal antitrust laws, based upon alleged collusive conduct and market manipulation by underwriters and institutional investors, where Congress has directed that the challenged conduct be subject to comprehensive regulation by the Securities and Exchange Commission and the National Association of Securities Dealers.

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BRIEF OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether a cause of action is available under the federal antitrust laws to challenge alleged collusive conduct and market manipulation in initial public offerings by underwriters and institutional investors. The National Association of Securities Dealers, Inc. ("NASD"), has a substantial interest in the resolution of this question because the NASD has regulatory responsibilities that fall within the subject matter of this suit. The availability of an antitrust suit based on alleged collusion and market manipulation by broker-dealers would disrupt the NASD's carefully calibrated regulatory regime—a regime that provides ample guidance for participants in the initial public offering ("IPO") marketplace, and ample authority to punish the misconduct of market participants.

The NASD is a private Delaware corporation, functioning as a self-regulatory organization ("SRO") and registered with the Securities and Exchange Commission ("SEC") as a national securities association pursuant to the 1938 Maloney Act Amendments to the Securities Exchange Act of 1934. 15 U.S.C. § 78o-3 *et seq.* The NASD and other SROs exercise regulatory authority over the securities industry, subject to the stringent oversight of the SEC, which must approve nearly all SRO rules. For more than half a century, the

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that counsel for co-petitioner Bear, Stearns & Co., Inc., is also counsel for *amicus* in this matter, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

NASD has been the primary regulatory body for the broker-dealer industry, and it closely regulates the market activities of the underwriters and institutional investors named as defendants in this antitrust suit. Securities Exchange Act Release No. 2211, 5 S.E.C. 627 (Aug. 7, 1939). Significantly, the SEC and NASD are statutorily required to take competitive considerations into account—the goal of the antitrust laws—when discharging their regulatory mandates. *Id.* § 77b(b); *id.* § 78o-3(b)(9). Both the SEC and NASD have initiated disciplinary proceedings—including against several of the petitioners—in response to the incidents of alleged price manipulation challenged in this case.

The NASD's regulatory responsibilities provide it with a unique perspective into the issues raised by this case and a profound awareness of the far-reaching consequences that would result from superimposing the antitrust laws on the securities regulatory framework. The NASD fully agrees with the arguments in favor of immunity that the SEC, as *amicus curiae*, raised before the lower courts, and urges this Court to grant the petition for certiorari. The Second Circuit's holding that investors may bring antitrust suits challenging alleged collusion and market manipulation by broker-dealers will create conflicting systems of securities regulation and significantly disrupt the uniform national securities market that Congress intended to establish. The pervasive litigation and crippling regulatory confusion that will inevitably result from the Second Circuit's decision will impede the SEC's and NASD's efforts to regulate the broker-dealer industry in a manner that promotes market stability and capital formation, and will affect the investments of millions of Americans.

STATEMENT

Investors who have suffered losses due to improper collusion and market manipulation by broker-dealers have several remedies at their disposal, including filing a securities

fraud claim or initiating a complaint with the NASD. An antitrust claim, however, is not among the available remedies.

When Congress enacted the securities laws, it impliedly repealed the antitrust laws as to market activities subject to SEC and SRO regulation and thereby immunized these activities from antitrust liability. Indeed, repeal of the antitrust laws "*must* be implied in order to permit the Exchange Act"—as well as the national securities market and cooperative system of SEC and SRO regulation established thereunder—"to function *as envisioned by Congress*." *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 688 (1975) (emphases added); *see also, e.g.*, 15 U.S.C. § 78b (the securities laws are intended "to remove impediments to and perfect the mechanisms of a national market system for securities").

The Second Circuit's contrary conclusion conflicts with this Court's precedent and with the decisions of other circuits applying the antitrust immunity doctrine. This Court should grant certiorari to resolve these conflicts and to ensure that the reticulated securities regulatory regime established by Congress is not undermined by antitrust claims that impose inconsistent obligations on market participants and that are decided by juries lacking the SEC's specialized knowledge of the securities markets.

1. The allegations in this case concern the IPO activities of underwriting firms and institutional investors that are subject to pervasive regulation by the SEC and NASD. Pet. App. 127a (SEC *amicus* brief). Underwriters play an integral role in the IPO process. In a "firm commitment" underwriting, they purchase securities from an issuing corporation at a predetermined price and then resell the securities to institutional investors and members of the public at a higher price. Pet. App. 4a. To mitigate the risk inherent in the IPO process, underwriters form "syndicates" with other firms, which jointly underwrite a security. Pet. App. 5a. The NASD regulates syndicate operations. *See, e.g.*, NASD Rule 2710:

Corporate Financing Rule—Underwriting Terms and Arrangements.

An underwriter has a strong stake in the success of the securities that it markets because, among other things, price increases that occur in the aftermarket—the period after an IPO is first distributed—augment the benefit to its customers and the likelihood that the firm will be hired to underwrite future IPOs. Pet. App. 8a. The NASD has issued rules that establish the boundary between lawful activities designed to maintain a security's price and improper efforts to manipulate price through collusion with other broker-dealers. *See, e.g.*, NASD Rule 2790: Restrictions on the Purchase and Sale of Initial Equity Offerings; NASD Manual, IM-2110-5: Anti-Intimidation/Coordination ("It is conduct inconsistent with just and equitable practices of trade" for an underwriter "to coordinate [its] price . . . with any other [NASD] member," except "to the extent permitted by the federal securities laws"). The SEC has also promulgated extensive regulations—most notably, Regulation M—that draw a precise line between permissible and impermissible efforts to maintain a security's price. *See, e.g.*, 17 C.F.R. § 242.104(b) (prohibiting price stabilization practices, "except for the purpose of preventing or retarding a decline in the market price of a security").

2. Notwithstanding the availability of securities law remedies, respondents elected to challenge the validity of the syndicate system and several incidents of alleged market manipulation by filing an antitrust suit in the United States District Court for the Southern District of New York against a number of major underwriters and institutional investors. Pet. App. 72a. One group of respondents filed suit under section 1 of the Sherman Act, 15 U.S.C. § 1, while another group initiated a class action alleging violations of section 2(c) of the Robinson-Patman Act. *Id.* § 13(c). Both sets of claims challenged the validity of syndicate arrangements used to market IPOs and alleged that underwriting firms and

institutional investors had conspired to inflate the aftermarket price of a number of technology securities that went public in the late 1990s. Pet. App. 17a-20a.

Respondents' suit was only one of several judicial and regulatory responses to alleged misconduct in the marketing of technology IPOs. Another group of investors filed a securities fraud class action against many of the same defendants, alleging much of the same wrongdoing. *See In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003). And the SEC and NASD commenced investigations into the alleged incidents of market manipulation and initiated enforcement proceedings against several broker-dealers. Pet. App. 137a.

In this case, the SEC submitted an *amicus* brief urging the district court to dismiss respondents' claims. Pet. App. 124a. The SEC argued that the antitrust laws had been impliedly repealed in this area because the securities transactions at issue were subject to comprehensive SEC and NASD oversight and that respondents' "attempts to remedy th[eir] claims through the antitrust laws threaten to disrupt the Commission's regulatory regime." Pet. App. 128a.

The district court dismissed the case in its entirety. Pet. App. 121a. Relying upon this Court's decisions in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, and *United States v. NASD*, 422 U.S. 694 (1974), the court concluded that respondents' allegations did not state a valid antitrust claim because—at least as to the market activities challenged in this suit—the antitrust laws have been impliedly repealed by the federal securities laws. Pet. App. 73a. The court determined that much of the wrongdoing alleged by respondents—such as the underwriters' use of the syndicate system to market IPOs—was expressly *authorized* by the securities laws and that the availability of an antitrust claim challenging such coordination among underwriters would bring the two statutory regimes into direct conflict. Pet. App. 87a. The

court further held that, to the extent respondents alleged price manipulation that was prohibited by the securities laws and regulations, it was the responsibility of the SEC and NASD to enforce these proscriptions and that supplemental enforcement by antitrust plaintiffs would only disrupt these enforcement efforts. Pet. App. 94a. The court concluded that, because "the SEC, both directly and through its pervasive oversight of the NASD and other SROs, either expressly permits the conduct alleged . . . or has the power to regulate the conduct," a "failure to find implied immunity would conflict with [the] overall regulatory scheme." Pet. App. 119a. In the absence of immunity, the court explained, petitioners would be forced "to navigate the Scylla of securities regulation and the Charybdis of antitrust law." Pet. App. 73a.

3. The Second Circuit reversed. Based upon its interpretation of *Gordon* and *NASD*, the court devised a fact-intensive four-pronged test for determining whether the antitrust laws have been impliedly repealed. Pet. App. 57a. The Second Circuit's novel framework—which it had not applied in earlier antitrust immunity cases (*see, e.g.*, *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 147 (2d Cir. 2003))—considers the securities laws' legislative history, whether the antitrust and securities laws could impose conflicting mandates on regulated persons, whether application of the antitrust laws would nullify a provision of the securities laws, and the frequency with which the SEC and NASD regulate the anticompetitive conduct. Pet. App. 57a.

The Second Circuit concluded that Congress had not intended an implied repeal of the antitrust laws in this factual setting because the securities laws' legislative history yielded no explicit evidence of Congress's intention to do so. Pet. App. 64a. The Second Circuit also emphasized that respondents had failed to identify a provision of the securities laws that would be nullified by the availability of antitrust relief and that the SEC had not explicitly authorized the anticompetitive agreements alleged by respondents. Pet. App. 65a-

66a. Refusing to credit the arguments raised by the SEC as *amicus curiae*, the court dismissed as irrelevant the pervasive securities regulatory regime with which underwriters and institutional investors must comply. Although the Second Circuit conceded that "their conduct may be subject to regulation and control by the SEC in great detail," it did not accord that factor any weight in its analysis because petitioners had not received explicit authorization to engage in the market manipulation of which they are accused. Pet. App. 69a.

SUMMARY OF ARGUMENT

The NASD possesses a unique regulatory vantage point, informed by extensive institutional knowledge about the complex workings of the securities markets. From the NASD's regulatory perspective, there is an urgent need for this Court to grant certiorari because the Second Circuit's decision severely undermines the stability of the capital markets and infuses uncertainty into the uniform, nationwide regulatory system established by the federal securities laws. Indeed, the resolution of the exceptionally important question presented will have profound implications for investors, the securities industry, and the overall strength of the U.S. economy.

The SEC's *amicus* submissions to the lower courts amply demonstrate that the Second Circuit's decision allowing respondents' antitrust suit to proceed is fundamentally inconsistent with the regulatory regime that Congress established when enacting the securities laws. Congress intended for the regulation of the national securities market to rest with an expert agency, the SEC, and with the SROs that operate under its auspices. Pursuant to this regulatory authority, the SEC and SROs have promulgated a comprehensive and carefully reticulated securities regulatory regime that—unlike the antitrust laws—promotes both competition *and* other interests, including market stability and capital formation. The availability of an antitrust cause of action to challenge collu-

sion and alleged price manipulation by broker-dealers subjects the regulated community to conflicting standards of conduct and vests antitrust juries with significant authority over the operations of the securities markets. It was precisely to avoid such regulatory uncertainty and inexpert decision-making that Congress impliedly repealed the antitrust laws in this area when enacting the Exchange Act and Securities Act.

Certiorari is also warranted because the Second Circuit's decision is flatly inconsistent with this Court's antitrust immunity jurisprudence. In *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States v. NASD, Inc.*, 422 U.S. 694 (1975), this Court established that the antitrust laws are impliedly repealed wherever there is a potential conflict between the securities and antitrust laws, or a pervasive regulatory scheme in place. Such a potential conflict exists here because the SEC possesses the unexercised regulatory authority to authorize the market manipulation alleged by respondents. Moreover, the market activities of all broker-dealers—including syndicate relationships between underwriters and price-maintenance activities—are pervasively regulated by both the SEC and NASD. The Second Circuit disregarded this precedent when it reversed the dismissal of respondents' antitrust claims. In so doing, it created an intractable conflict with this Court's holdings and with decisions from the Fifth and Seventh Circuits that faithfully applied the implied immunity standards set forth in *Gordon* and *NASD*.

The petition for a writ of certiorari should be granted.

ARGUMENT

I. THE DECISION BELOW WILL UNDERMINE THE COMPREHENSIVE SECURITIES REGULATORY REGIME.

The NASD stands on the frontline of securities regulation. As an SRO, the NASD monitors its members' compli-

ance with the securities laws and with its own rules. The NASD has responsibility for regulating its members' participation in the IPO process and disciplining members who engage in prohibited collusion and market manipulation. The NASD's regulation of broker-dealers requires it to enforce nuanced distinctions between broker-dealers' permissible joint activities and improper collusive arrangements, and between lawful efforts to stabilize a security's price and impermissible instances of price manipulation. The SEC, in turn, closely oversees the NASD's regulatory activities and promulgates regulations applicable to all market participants in order to promote "creation of a national securities market." National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 102, 110 Stat. 3416, 3418; *see also* 15 U.S.C. § 78o-3(b)(6) (an organization may not be registered as a national securities association unless its rules promote a "national market system"). The Second Circuit's decision profoundly disrupts this comprehensive national regulatory scheme.

1. The NASD and SEC are statutorily required to take competitive considerations into account during their regulatory decision-making. Indeed, it is a prerequisite to the NASD maintaining registration as a national securities association that the SEC find that its rules "do not impose any burden on competition not necessary or appropriate." 15 U.S.C. § 78o-3(b)(9); *see also, e.g.*, *id.* § 77b(b) ("Whenever . . . the Commission is . . . required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."). But because the SEC and NASD are also required to *balance* competitive interests against *other* considerations, such as ensuring the stability of the securities markets and promoting capital formation, the antitrust laws' overriding concern with promoting competition cannot be reconciled with the objec-

tives of the securities regulatory regime. *Id.*; *id.* § 78c(f). This Court itself has recognized that, because safeguarding competition is not the only concern of the SEC, inconsistent standards of conduct "are likely to result [from application of the antitrust laws to securities transactions] because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry." *Gordon*, 422 U.S. at 689.

2. The SEC and NASD pervasively regulate the syndicate arrangements and price manipulation that are the subject of respondents' antitrust claims to ensure that these activities are consistent with competition, market stability, and capital formation.

Although coordination among underwriting syndicates is generally a permissible means of effecting an IPO distribution, *see* Securities Exchange Act Release No. 17,371, 45 Fed. Reg. 83,707 (Dec. 19, 1980), the NASD has promulgated extensive rules concerning syndicates' operations. *See* Pet. App. 136a (SEC *amicus* brief) ("The NASD comprehensively regulates syndicate practices pursuant to rules that are formally reviewed and approved by the Commission."). The rules govern the terms of syndicate agreements and underwriter compensation. *See, e.g.*, NASD Rule 2710: Corporate Financing Rule—Underwriting Terms and Arrangements (requiring underwriting compensation to be fair and reasonable); NASD Rule 2770: Disclosure of Price in Selling Agreements (requiring the disclosure of the public selling price in syndicate agreements); NASD Rule 4624: Penalty Bids and Syndicate Covering Transactions (requiring written notice of syndicate covering transactions). The SEC has explicitly approved each of these NASD rules. 15 U.S.C. § 78s(b).

The SEC has also promulgated regulations distinguishing acceptable and unacceptable means of maintaining a se-

curity's price. Although the securities regulatory system generally looks with disfavor on price manipulation, 15 U.S.C. § 78i(a), the SEC has not instituted a blanket prohibition on all such activities. *See* Pet. App. 9a ("the securities regime tolerates a little price manipulation in order to further other goals") (internal quotation marks omitted). The SEC has instead designated certain narrowly defined circumstances where price-maintenance efforts are acceptable. *Compare* 17 C.F.R. § 242.101(a) (prohibiting a participant in a securities distribution from bidding on or purchasing a security during the initial offering period), *with id.* § 240.101(b) (exempting ten categories of transactions from the prohibition, including de minimis transactions). Indeed, the SEC possesses broad authority to exempt classes of securities and regulated persons from *any* of the securities laws and regulations. 15 U.S.C. § 78mm.

3. The Second Circuit's decision has greatly unsettled this regulatory regime. The availability of antitrust claims based upon securities transactions will unnecessarily burden market participants by requiring them to comply with a second set of partially overlapping and potentially conflicting legal requirements and by fostering complex, time-consuming, and resource-intensive litigation. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available . . . ."). Antitrust suits will significantly impede the capital formation process by imposing liability for instances of conduct that may arguably be anticompetitive but that the SEC has found to be beneficial to the capital markets. Indeed, the risk of antitrust liability will itself deter such lawful and productive conduct.

In lieu of the undifferentiated treatment that anticompetitive behavior receives from the antitrust laws, the securities expertise of the SEC and NASD is needed to determine

whether the conduct of which petitioners stand accused is truly detrimental to the capital markets. Courts and juries applying the antitrust laws lack the specialized knowledge of the securities markets necessary to evaluate the propriety and lawfulness of such conduct. *See NASD*, 422 U.S. at 734 (antitrust immunity is necessary to prevent the "disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws").

The SEC and NASD have brought their regulatory expertise to bear in response to the allegations of price manipulation that are the subject of this suit. Indeed, the SEC and NASD initiated disciplinary proceedings against several petitioners for the very conduct at issue in this case. *See, e.g.*, *SEC v. Robertson Stephens, Inc.*, No. 03-00027 (D.D.C. Jan. 10, 2003) (consent judgment against Robertson Stephens, Inc., based upon allegation that it entered into anticompetitive arrangements with technology IPO customers); *SEC v. Credit Suisse First Boston Corp.*, No. 02-00090, 2002 WL 479836 (D.D.C. Jan. 29, 2002) (consent decree enjoining Credit Suisse from engaging in improper IPO-related conduct); Pet. App. 137a (SEC *amicus* brief) (detailing the NASD's enforcement efforts). The NASD also is considering several rules amendments to address incidents of price manipulation, *see, e.g.*, NASD Proposed Rule 2712: IPO Allocations and Distributions (SR-NASD-2003-140), and has promulgated NASD Rule 2790: Restrictions on the Purchase and Sale of Initial Equity Offerings, which sets forth a series of restrictions on the terms of IPO offerings.

In light of the SEC's and NASD's comprehensive regulation of the conduct alleged in respondents' complaint, there is no place for a supplemental antitrust enforcement role. Investors who allege that they have been injured by price manipulation may file a complaint with the NASD or initiate a federal securities fraud claim (as another group of plaintiffs did concerning the very conduct at issue here (Pet. App. 2a)). Allowing investors to pursue an antitrust claim against un-

derwriters and investment companies will needlessly—and dangerously—unsettle the existing, highly detailed regulatory framework. *See Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) ("where regulatory and antitrust regimes coexist, antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies") (Breyer, C.J.) (internal quotation marks and citations omitted).

The future efficacy of securities regulation—and, by extension, the future stability of the uniform, national securities market established by Congress—is squarely implicated by this case. Certiorari is warranted to ensure that the expert judgments of the SEC and NASD are not displaced by antitrust plaintiffs and the juries deciding their claims.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ANTITRUST IMMUNITY JURISPRUDENCE.

The Second Circuit devised a novel, four-factor inquiry for determining whether Congress intended the implied repeal of the antitrust laws when enacting the Exchange Act and the Securities Act. In so doing, it misapplied this Court's principal antitrust immunity decisions, *Gordon* and *NASD*, and improperly discounted the disruptive impact that an antitrust suit would have on the existing securities regulatory structure.

1. In *Gordon*, this Court held that the New York Stock Exchange ("NYSE") possessed implied antitrust immunity from a Sherman Act suit challenging its fixed-rate commission structure. 422 U.S. at 691. The Court's analysis emphasized that the SEC exercised regulatory authority over the NYSE's commission rates and had approved its fixed-rate structure. *Id.* at 682. There was accordingly a "plain repugnancy" between the antitrust laws, which treated price fixing as a *per se* violation, and the securities regulatory scheme, which tolerated some instances of price fixing. *Id.* Implied

antitrust immunity was necessary, the Court explained, because allowing the antitrust suit to proceed would have subjected the NYSE to conflicting standards of conduct and "unduly interfere[d] . . . with the operation of the Securities Exchange Act." *Id.* at 686.

NASD, decided the same day as *Gordon*, further defined the parameters of implied antitrust immunity. The Court concluded that an antitrust suit could not be brought to challenge agreements fixing the price of mutual funds. *NASD*, 422 U.S. at 694. Indeed, the alleged wrongdoing in *NASD* was very similar to that at issue here: The plaintiffs alleged, for example, that mutual fund underwriters and broker-dealers had entered into agreements requiring the broker-dealers to maintain the predetermined public offering price when selling mutual fund shares, thereby artificially inflating the price. *Id.* at 702 n.11. The Court held that the SEC had the power to authorize such price restraints under the Investment Company Act, 15 U.S.C. § 80a-22(f), and that—although the SEC had *not* actually exercised that power—antitrust immunity was required because there was "no way to reconcile the Commission's power to authorize these restrictions with the competing mandate of the antitrust laws." *NASD*, 422 U.S. at 722. In light of the SEC's authority to authorize conduct proscribed by the antitrust laws, these laws had to "give way" to ensure the viability of the mutual fund regulatory scheme established by the Investment Company Act. *Id.* at 729.

The Court further concluded that an antitrust claim could not be brought against the NASD for allegedly conspiring with its members to fix mutual fund prices because such a suit threatened to undermine the SEC's "extensive" "supervisory authority" over the NASD. *NASD*, 422 U.S. at 732. An antitrust action "pose[d] a substantial danger that [the NASD] would be subjected to duplicative and inconsistent standards." *Id.* at 735. Immunity was therefore necessary, the Court determined, in order to ensure that the SEC "could

carry out [its regulatory] responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *Id.* at 734.

Gordon and *NASD* remain this Court's authoritative pronouncements on the implied repeal of the antitrust laws. Indeed, in *Trinko*, 540 U.S. 398, this Court recently reaffirmed that antitrust causes of action cannot coexist with pervasive regulatory schemes. Although *Trinko* was not an antitrust immunity case, the Court explicitly drew upon antitrust immunity principles to conclude that a plaintiff failed to state a claim under the Sherman Act in a suit alleging that an incumbent local exchange carrier had violated its obligations under the Telecommunications Act of 1996. *See id.* at 412 ("Just as regulatory context may in other cases serve as a basis for implied immunity, it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2" of the Sherman Act) (citing *NASD*, 422 U.S. at 730-35). The Court explained that, where there is a regulatory structure in place to deter and remedy anticompetitive harm, "the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny." *Id.* Because the Federal Communications Commission took antitrust considerations into account in its regulatory decision-making, it was an "effective steward of the antitrust function," and, the Court concluded, a suit under the Sherman Act was therefore unavailable. *Id.* at 413.

2. The Second Circuit's holding that an antitrust claim can be brought challenging securities transactions directly regulated by the SEC and NASD cannot be reconciled with *Gordon*, *NASD*, or *Trinko*. Indeed, this case is virtually indistinguishable from *NASD*, where the Court held that alleged participants in a mutual fund price-fixing scheme were immune from an antitrust suit because the SEC *could have* authorized such price fixing (although it had not actually done so) and there accordingly existed the *possibility* of a

conflict between the regulatory regime and the antitrust laws. 422 U.S. at 722. Here, respondents are challenging alleged price manipulation in the aftermarket for IPO securities, an activity that the SEC has claimed the right to authorize. Pet. App. 64a. This potential conflict between the antitrust laws' blanket prohibition on price fixing and the securities regulatory regime's more nuanced approach compels the conclusion that Congress intended to revoke the antitrust laws because the availability of an antitrust suit would "unduly interfere" with the comprehensive and finely calibrated regulatory system to which the securities laws gave rise. *Gordon*, 422 U.S. at 686.

Contrary to *Gordon*'s teachings, however, the Second Circuit wholly discounted the disruptive effect that an antitrust suit would have upon the SEC's and NASD's regulatory regimes and upon firms' capital formation efforts. The Second Circuit instead placed significant emphasis upon its determination that the SEC could not *compel* petitioners to undertake the market manipulation alleged in this case and thereby impose a mandate inconsistent with the antitrust laws. Pet. App. 65a. Although the existence of such inconsistent obligations is a factor that weighs heavily in favor of a finding of implied repeal, it is not the *sine qua non* of antitrust immunity. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 244-45 (1996) ("This Court has implied antitrust immunities that extends beyond statutorily *required* joint action . . . .") (emphasis in original). Indeed, in *NASD*, this Court premised the existence of antitrust immunity upon a potential conflict between conduct *authorized*—not compelled—by the securities regulations and the requirements of the antitrust laws. 422 U.S. at 722.

The Second Circuit's decision also conflicts with this Court's conclusion in *NASD* that a "pervasive regulatory" regime impliedly repeals the antitrust laws. Just as the NASD is subject to the "extensive" "supervisory authority" of the SEC, *NASD*, 422 U.S. at 732, the securities dealings of

the underwriters and institutional investors sued in this antitrust suit are subject to pervasive regulation by the SEC and NASD. If the Second Circuit had correctly applied *NASD*, it would have recognized that Congress intended the securities expertise of the SEC and the SROs—not antitrust juries—to determine the propriety of alleged anticompetitive behavior in the securities industry. *See Brown*, 518 U.S. at 241, 242 (holding that labor law's implicit antitrust exemption barred an antitrust suit because allowing the suit to proceed would have "require[d] antitrust courts to answer a host of important practical questions about how collective bargaining . . . is to proceed," a matter best addressed by the experts at the National Labor Relations Board, rather than "nonexpert antitrust judges and juries").

If the Second Circuit's decision is left in place, it will expose underwriters and other broker-dealers to conflicting standards of conduct and destabilize the existing securities regulatory scheme, two developments that this Court expressly sought to avoid in *Gordon* and *NASD*. Indeed, IPO participants will be unwilling to face the uncertain risk of trebled antitrust liability. This Court should grant certiorari to resolve the profound conflict between the Second Circuit's decision and this Court's implied immunity jurisprudence.

III. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS' ANTITRUST IMMUNITY DECISIONS.

It is also impossible to reconcile the Second Circuit's holding with decisions in which other circuits, faithfully applying this Court's antitrust immunity jurisprudence, have concluded that antitrust claims may not be premised upon alleged market manipulation by broker-dealers.

1. In *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975), the Seventh Circuit held that an alleged conspiracy among a stock exchange and brokerage houses to manipulate stock prices could not be challenged

under the Sherman Act because "[p]rivate parties may only bring antitrust claims against an exchange or its members when there is no other vehicle for review." *Id.* at 1300. The court explained that the "sort of manipulation scheme underlying the plaintiffs' claim here was envisioned to be fully dealt with under the securities acts." *Id.* Because the plaintiffs could have brought a securities fraud claim concerning the alleged price manipulation, the Seventh Circuit concluded that an overlapping antitrust claim was unavailable. *Id.*

Similarly, in *Austin Municipal Securities, Inc. v. NASD, Inc.*, 757 F.2d 676 (5th Cir. 1985), the Fifth Circuit held that the antitrust laws are impliedly repealed as to the NASD disciplinary process because the SEC exercises extensive regulatory authority over the NASD. *Id.* at 695. The court warned that "[s]uperimposing the antitrust laws on the securities laws would unduly interfere with the SEC's jurisdiction" and "upset[] the balance of interests established by Congress in the Exchange Act." *Id.* The Fifth Circuit further recognized that the availability of an overlapping antitrust cause of action would disrupt the SEC's pervasive oversight of the NASD's operations and "thwart[] Congressional intent underlying the Exchange Act." *Id.*; *see also Harding v. Am. Stock Exch., Inc.*, 527 F.2d 1366, 1370 (5th Cir. 1976) (holding that an exchange's decision to delist a stock was immune from an antitrust suit because the decision was subject to SEC approval and immunity was therefore "necessary . . . to make the Exchange Act viable"); *Thill Sec. Corp. v. N.Y. Stock Exch.*, 633 F.2d 65, 70 (7th Cir. 1980) (holding that the New York Stock Exchange's antirebate rule, which prohibited a member from sharing a commission with nonmembers, was not subject to an antitrust challenge because the rule was part of the fixed-rate commission system approved by the SEC).

2. The Second Circuit's decision cannot be squared with the antitrust immunity analysis of the Seventh Circuit in

Schaefer, which appropriately applied this Court's teachings in *Gordon* and *NASD*. Indeed, the Second Circuit's holding that investors may bring an antitrust suit to challenge alleged market manipulation is wholly at odds with the Seventh Circuit's conclusion that price manipulation does not give rise to an antitrust cause of action if a remedy is available under the securities laws. *Schaefer*, 509 F.2d at 1300. Here, such a remedy is certainly available to respondents, as evidenced by the fact that another group of investors filed a securities fraud claim in the Southern District of New York concerning much of the same conduct at issue in this case. Pet. App. 2a.[2]

The Second Circuit's failure to take into account the destabilizing effect that the availability of an antitrust suit will have upon the securities regulatory framework is also inconsistent with the analysis in *Austin Municipal*, *Harding*, and *Thill*, each of which recognized that the securities laws impliedly repealed the antitrust laws and that Congress has acquiesced in the existing securities regulatory structure. Just as the availability of an antitrust suit challenging the NASD's disciplinary process in *Austin Municipal* would have "unduly interfere[d] with the SEC's jurisdiction" over the NASD's

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[2] Notably, the decision below is also inconsistent with earlier Second Circuit decisions concerning the scope of the antitrust immunity doctrine, and it therefore significantly disturbed the settled expectations of the regulated community, which—until the decision below—reasonably believed that the marketing of IPOs was governed by the securities statutes and regulations, not by the sometimes divergent requirements of the antitrust laws. *See In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 148 (dismissing a Sherman Act claim alleging that stock exchanges had conspired to limit the listing of securities to one exchange at a time, because the antitrust laws had been impliedly repealed in order "to preserve the authority of the SEC to regulate that conduct"); *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 801 (2d Cir. 2002) (holding that underwriters were impliedly immune from an antitrust claim alleging the manipulation of aftermarket securities prices because the availability of an antitrust suit would "conflict with Congress's implicit determination that the SEC should regulate the alleged anti-competitive conduct").

activities, 757 F.2d at 695, an antitrust suit against underwriters and institutional investors based upon syndicate practices and alleged price manipulation would impede the ability of the SEC and NASD to fulfill their congressional mandate to regulate these activities themselves.

If the Second Circuit's decision remains undisturbed, the regulatory requirements with which market participants must comply will differ depending upon the circuit in which a suit is filed, in clear contravention of Congress's intention to "remove impediments to and perfect the mechanisms of a *national* market system for securities." 15 U.S.C. § 78b (emphasis added). Certiorari is warranted to preserve the uniformity of the securities regulatory regime and to reconcile the Second Circuit's erroneous understanding of antitrust immunity with that of other circuits that have properly heeded this Court's decisions in *Gordon* and *NASD*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 12, 2006